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In the Supreme Court of the United States

OCTOBER TERM, 1957

A. W. HARTWIG and JEFF TINGLE, Petitioners

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

STERLING M. WOOD,
Attorney for Petitioners.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The undersigned attorney, acting on behalf of A. W. Hartwig and Jeff Tingle, prays that a writ of certiorari issue to review the judgment entered in the above case by the United States Court of Appeals for the Ninth Circuit on May 23, 1957, which affirmed a judgment of the District Court of the United States for the District of Montana.

OPINION BELOW

The opinion of the said Court of Appeals (Appendix, infra, p. 18) is reported in 244 F. 2d 849, in the advance sheets, of that publication, of August 12, 1957.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit (Appendix, infra, p. 28) was entered May 23, 1957; and the petition in that Court for a re-hearing was denied July 8, 1957 (see page 394 of the record certified to this Court by the Clerk of the said Court of Appeals). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented is whether the Court of Appeals for the Ninth Circuit erred in affirming the judgment of the lower court, and involves a consideration (a) of the effect of the repeal by the Housing and Rent Act of 1947 of the Veterans Emergency Housing Act of 1946, and (b) of the effect of the ruling by this Court that Priorities Regulation No. 33, issued by the Civilian Production Administration, was repealed by the said 1947 Act.

Briefly stated, the petitioners herein contend that in affirming the judgment of the lower court, the Court of Appeals for the Ninth Circuit disregarded the effect of the Housing and Rent Act of 1947, enacted by Congress, and also settled and controlling decisions of this Court; and this contention is made with entire respect for the said Court of Appeals.

STATEMENT

The action here involved, and in connection with which this petition for a writ of certiorari is presented,

was brought October 8, 1948, in the United States District Court for the District of Montana, Billings Division, by the United States of America, as plaintiff, against A. W. Hartwig and Jeff Tingle as defendants, and also against one W. C. Jennings, as a defendant, who died before the case went to trial.

The amended complaint in the case at bar upon which the case was tried, and the attitude of Government counsel throughout the record, establish that the United States of America claims jurisdiction of this action is conferred by the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50, U.S.C.A. App., Sec. 1821, et seq.) and by Priorities Regulation No. 33, promulgated by the Civilian Production Administration, and those contentions of the government are denied in the answer to the amended complaint of the petitioners herein. The said answer also denies the allegation of the amended complaint that the aforesaid Priorities Regulation No. 33 has been in effect at all times material to this action; and, generally, the said answer of petitioners herein puts the government to its proof. This action was brought in the trial court October 8, 1948; and yet the said 1946 Act was repealed June 30, 1947, by the Housing and Rent Act of 1947. The repeal clause of the said 1947 Act repeals expressly all the various sections of the said 1946 Act involved, and concludes with the following proviso:—

"Provided, that any allocation made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said act, and before the date of the enactment of this act, with respect to veterans of World War II, their families, and others, shall remain in full force and effect."

In the first count of the said amended complaint herein it is alleged that the petitioners herein, the defendants below, applied for and received authorization for priorities assistance from the government to construct a number of dwellings in Montana and that the maximum sales price finally established was $8,000.00 for each dwelling for which the priorities assistance was granted. Then it is alleged that the petitioners herein represented, by plans and specifications and otherwise, that the said maximum sales price included all special assessments and that such established maximum sales price was required by Priorities Regulation No. 33 to include all such improvements as water mains, sewers, etc. It is alleged finally in this count that, after the issuance of authorization and priorities assistance and during the time Priorities Regulation No. 33 remained in effect, the defendants, the petitioners herein, sold 25 authorized dwellings and violated the Acts involved and the said Regulation by selling some of the dwellings at prices in excess of the maximum sales prices approved by the Federal Housing Administration, and by failing to construct the dwellings in accordance with the said plans and specifications; and the government

then lists claimed excessive sale prices and defects and omissions in an attached schedule, as a result of which it is alleged, finally, in this count that the defendants were enriched and that the purchasers of the dwellings constructed have been deprived of things of value to which they were entitled.

In the second count of the said amended complaint most of the allegations of the first count, as above, are repeated, and it is alleged, further, that the defendants violated the law and the regulations by selling the dwellings involved without taking care of special improvement taxes assessed against the properties involved.

The answer of the petitioners herein, the defendants in the trial court, to the amended complaint, puts in issue all the essential allegations of that amended complaint. Furthermore, the defendants pleaded defensively in their said answer that, in good faith, they constructed and completed the housing accommodations, to which the second count of the amended complaint refers, in substantial compliance with the specifications, descriptions of materials and plans involved and approved, and that, then, the government, acting through the Federal Housing Administration, inspected and accepted the dwellings so completed as in full conformity with the specifications, descriptions and plans, and as full performance by and on the part of the said defendants, the petitioners herein, of their contract with the government, or otherwise, for

the construction and completion of the housing accommodations and as full satisfaction and in full discharge of all and every the obligations of the said defendants, the petitioners herein, or either of them, under any such contract. The trial court awarded the government judgment as demanded in its amended complaint, and that judgment has been affirmed by the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Ninth Circuit is in conflict with decisions of this Court that are applicable by reason of the repeal by Congress of the Veterans Emergency Housing Act of 1946 by the Housing and Rent Act of 1947; and particularly disregards the effect of the repeal by Congress of Priorities Regulation No. 33 that was promulgated by the Civilian Production Administration, and which Regulation is not a statute in any sense of the word.

1. In the Housing and Rent Act of 1947, approved June 30, 1947, Congress expressly repealed the Veterans Emergency Housing Act of 1946, and concluded that piece of legislation with a saving clause that, for the convenience of this Court, has been quoted, supra, herein. Nevertheless, the government stands primarily in this action, brought in 1948, upon the said 1946 Act, which it claims was still effective by virtue of the general statute 1 U.S.C. 109 (also referred to as Sec. 13 of the Revised Statutes) and disregards, as has the Court of Appeals for the Ninth Circuit, in its decision herein, the

rule laid down by this Court that the said general statute has no application to a repealed Act of Congress, where, as we submit is the case in the litigation at bar, *"the necessary implication arising from the terms of the law as a whole"* would *"set at naught"* the *"legislative mind **** by giving effect to the provisions"* of the said general statute. The italics comprise language taken from a decision of this Court presently to be cited and quoted from. The decision is that of Hertz v. Woodman et al., 218 U.S. 205, 54 L.Ed. 1001. In the Hertz case this Court, speaking through Mr. Justice Lurton, considers the effect of the Act of Congress 1 U.S.C. 109 above mentioned. After quoting from the statute in question, this Court had the following to say:

> "This provision has been upheld by this Court as a rule of construction applicable, when not otherwise provided, as a general saving clause, to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress" (citing cases).

Among the cases cited by this Court in the Hertz case is that of Great Northern Railway Company v. United States, 208 U.S. 452, 52 L.Ed. 567. This Court then quotes in the Hertz case from the Great Northern Railway Company decision, as follows, to-wit:

> "As the section of the Revised Statute in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested *either expressly or by necessary implication* (the italics herein are ours) in a subsequent enactment. But

while this is true, the provisions of Section 13 (the statute under consideration) are to be treated as if incorporated in and as a part of subsequent enactments, and therefore, under the general principles of construction requiring, if possible, that effect be given to all parts of a law, the section must be enforced *unless, either by express declaration or necessary implication, arising from the terms of the law as a whole,* it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13 ****."

Then, continuing, this Court has the following to say further in the Hertz case, to-wit:

"The repealing Act here involved includes *a saving clause, and if it necessarily, or by clear implication,* conflicts with the general rule declared in Section 13, the latest expression of the legislative will must prevail ****. The significance of Section 13 is therefore this: That if, prior to the repealing act, the defendants in error were under any liability or obligation **** that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the *saving clause* in the repealing act, *unless the special character of that clause, by plain implication,* cuts down the scope and operation of the general rule in Section 13."

It is fundamental and settled law that all parts, provisions or sections of a statute must be read, considered or construed together, and that each must be considered with respect to, or in the light of, all the other provisions or sections, and construed in connection, or harmony, with the whole. 82 C.J.S., Statutes, p. 694, et seq.,

80 Am. Jur., Statutes, Par. 358.

And in D. Ginsberg and Sons v. Joseph Popkin, 285

U.S. 204, 76 L.Ed. 704, this Court says it is a "cardinal rule" that effect shall be given to every clause and part of a statute. Furthermore, in State of California v. Deseret Water, Oil and Irrigation Co., 243 U.S. 415, 61 L.Ed. 821, this Court said:

> "The proviso *** is an important part of it (the statute to be construed) and, according to a familiar rule, must be given some effect."

Thus, in determining whether "by necessary implication" the 1947 Housing & Rent Act extinguishes the claimed rights sought to be enforced here by the government, effect must be given to the proviso in the said 1947 Act. In this connection it must be remembered that, without this proviso clause in the said 1947 Act, then, under U.S.C. 109, all rights created under the Veterans Emergency Housing Act of 1946, and existing at the time of the said 1947 act, would remain in force, including the items covered by the terms of the aforesaid proviso. The members of Congress, who passed the 1947 Act, were chargeable with a knowledge of the law existing at that time, and thus knew that the repeal by them of a federal statute, without more in the repealing act, would keep in effect all rights established under that federal statute while in force, in that U.S.C. 109 so provides, and that, consequently, it would be unnecessary and absurd to add a proviso to keep any such rights in effect. Members of Congress must also be charged with knowing (for such is the law) that when they added the proviso to the 1947

Act, supra, some effect would have been given to the terms of that proviso in applying the Act, as this Court has held in the case of State of California v. Deseret Water, Oil and Irrigation Co., cited supra. Giving effect to that proviso as drawn, and as added to the 1947 Act, and considering what members of Congress must be charged with knowing, when the 1947 Act was enacted into law, the plain *implication* of the proviso, which Congress put into the Act, is that the proviso sets forth the only rights left in effect by the repealing act and that all other rights under the 1946 Act, existing before its repeal, ended June 30, 1947. To contend to the contrary would be to charge Congress with doing an absurd thing in putting the proviso into the said Act, which may not be done under the law. It follows, therefore, that 1 U.S.C. 109 has no application whatsoever in the case at bar and that the claimed rights, made the basis of the amended complaint of the government herein, were extinguished by the 1947 Act and did not exist when this action was brought in 1948.

It seems apt, in connection with the foregoing, to refer to some further authorities that are to the point here, and to quote pertinent portions of the decision in Moresville Cotton Mills v. National Labor Relations Board, decided by the Circuit Court of Appeals for the Fourth Circuit, and reported in 97 F.2d 959. Paragraph 3 of the syllabus of the case reads as follows:

"The court may read into a statute something not expressed by Congress when the literal application of the statute would lead to absurd results."

The said court in this decision relies upon United States of America v. Katz, et al., 271 U.S. 354, 70 L.Ed. 986, where this Court said:

"All laws are to be given a sensible construction; and a literal application of the statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

In Territory of Alaska v. American Can Co., et al., 137 F. Supp. 181, the court carefully considers existing law that is applicable here, and the following is quoted from that decision for the convenience of this Court, to-wit:

"It is a fundamental rule of statutory construction that a general saving clause or statute preserves rights and liabilities which have accrued under the act repealed and that they operate to make applicable in designated situations the law as it existed before the repeal, *unless such application is negatived by the express terms or clear implication of a particular repealing act*, or where not otherwise provided by the repealing act. *And, where there are express savings clauses in repealing statutes* which are later in time, *constituting the express will of the Legislature, such have been taken as an indication of legislative intent to save nothing else from the repeal, and the general saving statute in force in the state does not apply.* 82 C.J.S., Statutes, Par 440, p. 1014; 50 Am. Jur., Statutes, 534-5, Secs. 527-528; Great Northern Ry. Co. v. United States, 208 U.S. 452, 28 S. Ct. 313, 52 L.Ed. 567; Wilmington Trust Co. v. United States, D.C., 8 F. 2d 205; United States v. Chicago, St. P., M. &

O. Ry. Co., D.C., 151 F. 84; United States v. Standard Oil Co., D.C., 148 F. 719.

"In the Wilmington Trust Co. case (28 F.2d 207) the District Court of Deleware held that repeal of parts of the Revenue Act of 1918, 40 Stat. 1057, by the Revenue Act of 1921, 42 Stat. 227, which provided that the parts repealed shall remain in force as to "the assessment and collection of all taxes which have accrued" under the previous act, left all of the estate tax provisions of the former statute except those expressly saved by the act 'as completely obliterated and extinguished * * * as if the repeal had been absolute and unqualified', since the saving clause kept alive the repealed parts of the earlier act for collection of only those taxes 'accrued' under the earlier act, and saves to the government only such previously accrued taxes. In this case the general Federal savings clause, R.S. Sec. 13, 1 U.S.C.A., Sec. 29, was relied upon to show that the liability of the tax was not destroyed by the repeal of the statute. Upon this point the opinion states:

" 'Of this statute the court, in Great Northern Railroad Co. v. United States, 208 U.S. 452, 28 S.Ct. 313, 52 L.Ed. 567, said: As it "has only the force of a statute, its provisions cannot justify a disregard of the will of Congress *as manifested, either expressly or by necessary implication, in a subsequent enactment.*" *As the estate tax provisions of the Revenue Act of 1918 were expressly repealed, with specified exceptions, it must be assumed that the exceptions specified constituted a denial of others.* To enlarge the exceptions by adding the provisions of Section 13 of the Revised Statutes thereto, or, more accurately stated, to add to the saving clause of the repealing statute the provisions of R.S. Sec. 13, which, as I understand it, is in implied, if not direct, conflict with the first sentence of the saving clause of the repealing act, would, I think, be a plain disregard of the will of Congress as manifested in the repealing act.' * * * *

"There is another fundamental rule of statutory construction which must be considered in this connection, and that is the rule of 'expressio unius est exclusio alterius'—the mention of one is the exclusion of others—which requires a holding that the Legislature intended to save the taxes specifically mentioned in the repealing act and to exclude all others. Sutherland on Statutory Construction, 3rd Ed. Vol. 2, p. 412, Sec. 4915; p. 416, Sec. 4916; Jones v. H. D. & J. K. Crosswell, Inc., 4 Cir., 60 F.2d 827; Rybolt v. Jarrett, 4 Cir., 112 F.2d 642; Territory ex rel. Sulzer v. Canvassing Board, 5 Alaska 602, at page 622.

"A decision of the Supreme Court of Kansas in the case of State v. Showers, 34 Kan. 69, 8 P. 474, 476, is especially in point, as it relates to a state saving clause as distinguished from the Federal saving clause. In that case the Court was considering the effect of a general saving statute identical with the Alaska statute, as against a later specific savings proviso contained in a repealing act. The opinion of the Court states as follows:

"'The question as to what should be repealed and what saved was before the legislature. They had the entire subject-matter thereof under consideration, and evidently intended to cover the entire ground; and evidently intended that nothing should be repealed except what they expressly repealed, and that nothing should be saved except what they expressly stated should be saved. They expressly saved some things; therefore it must be inferred that they intended to save no others. *Expressio unius est exclusio alterius.*'

"The opinion also points out that if the special saving clause in the repealing act was not intended to cover the entire ground and to substitute for the general savings statute, then it 'has no office to perform,' for the general saving clause would save all that it saves and very much more."

It follows, it is respectfully submitted, that, upon the foregoing grounds alone, the amended complaint in this action does not state facts sufficient to constitute a cause of action in either of the counts pleaded, and hence, that the Court of Appeals for the Ninth Circuit erred in rendering the decision herein at which this petition for a writ of certiorari is directed.

2. Apart from the intent of Congress, and the plain implications of the proviso, as per the argument and authorities supra, it is important to consider the effect of the Housing and Rent Act of 1947 upon Priorities Regulation No. 33, and also the legal importance of that Regulation as a necessary basis for the action at bar brought by the government. This Court has decided in United States of America v. Robert Fortier, et al., 342 U.S. 160, 96 L. Ed. 179, that statutory authority for Priorities Regulation No. 33 was repealed by the Housing and Rent Act of 1947, except only as otherwise provided in the proviso of the Act, which proviso, by its plain terms (supra) does not relate at all to any of the matters in the action at bar. And in Sedivy, et al., v. Superior Home Builders, Inc., et al., 188 F.2nd 729, Paragraph 5 of the syllabus of the case reads as follows:

> "Priorities Regulation 33 providing that no person may sell any dwelling built under regulation to Veterans for more than approved maximum sales price, was repealed by the Housing and Rent Act of 1947."

Thus, the further contention of the petitioners herein is that there was no basis whatever in law, when the action at bar was brought, for claiming that the alleged rights, made the basis of the amended complaint in this action, did then exist, in that the Veterans Emergency Housing Act of 1946 does not, alone, in terms or otherwise, create the claimed rights sued upon by the government in the case at bar. In order to establish those claimed rights the government must stand (as it is doing in its pleading in this case) not only on the Veterans' Emergency Housing Act of 1946 but also, and primarily, on Priorities Regulation No. 33. That Regulation (authorized by the 1946 Act) *alone sets forth* the provisions that create the claimed rights made the basis of suit herein. The said 1946 Act and the Regulation are submitted to this Court, (without quotations therefrom, which would have to be most voluminous) to speak for themselves in this connection and to establish the foregoing as a correct statement both of fact and of law. Thus, since Priorities Regulation No. 33 was repealed and nullified June 30, 1947, by the enactment of the Housing and Rent Act of 1947, and then ceased to exist, it follows that there is no basis, in law, for the claims pleaded herein by the government in this action, that was brought in the fall of 1948. And, accordingly the Court of Appeals for the Ninth Circuit has plainly erred in its rulings in that connection herein. Furthermore, it should be noted that the conclusion just

stated herein is confirmed by the fact that 1 U.S.C.A. 109, relates to *statutes, and not to regulations issued under a statute;* and there is nothing whatever in any act of Congress providing that a regulation, or rights created by it, shall remain in effect after the regulation has been repealed, as here, and nullified by an act of Congress.

3. But, apart from the foregoing under Subdivision 2 hereof, and assuming for the sake of argument only that Priorities Regulation 33 was effective herein when the suit at bar was brought, then, nevertheless, the Court of Appeals for the Ninth Circuit erred in holding that Section 944.54(e) thereof requires written approval for changes in plans from those specified in the original application. This portion of the said regulation reads as follows:

> "Construction of a project. A builder who uses the HH rating to get materials for housing accommodations must construct them in accordance with the description given in the application, except where he has obtained from the Federal Housing Administration approval for a change from the application."

This Court, in Belcher, et al., v. Linn, 24 How. 508, 16 L.Ed. 754, said:

> "When power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confined to his or their discretion, the acts so done are, in general, binding and valid as to the subject matter."

Thus, Exhibit 20 in the case at bar—a "Compliance Inspection Report" — in which the public officers in

charge certified, "Building Improvements Acceptably Completed" and "Closing papers may be submitted," is binding and valid; and there is no basis in any event, therefore, in the case at bar, for the claim of the government in its amended complaint that the buildings involved were not constructed and completed as required. Upon this ground alone the Court of Appeals for the Ninth Circuit erred in the rendition of its judgment herein at which this petition for a writ of certiorari is directed.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

STERLING M. WOOD
Attorney for Petitioners

September, 1957.

APPENDIX

1. Opinion of the Court of Appeals

No. 15145

May 23, 1957

United States Court of Appeals for the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Montana, Billings Division

Before: DENMAN, Chief Judge, and BONE and ORR, Circuit Judges

ORR, Circuit Judge:

The United States instituted an action against appellants, A. W. Hartwig and Jeff Tingle, under Sec. 2(a)(6) of the Second War Powers Act, 56 Stat. 177 (1942), and the Veterans Emergency Housing Act of 1946, 60 Stat. 207 (1946), to compel restitution of charges alleged to have been made above the ceiling price set by the Federal Housing Administration to named purchasers of

dwelling units constructed and sold by the appellants, and for the value of alleged construction deficiencies in violation of Priorities Regulation 33, which was issued in accordance with the Veterans Emergency Housing Act of 1946.

Appellants applied for and received authorization for priorities assistance from the Federal Housing Administration, hereafter F.H.A., on or about July 1, 1946, to construct twenty-seven dwelling units in the Calhoun Lane Subdivision of Yellowstone County, Montana. The maximum sales price of each unit was established at $8,000 upon the basis of certain representations of plans, specifications, and requisite materials. Through the use of the materials priorities, the appellants obtained building materials actually used in the construction of the particular dwellings. The sale of all of the units occurred no later than June 17, 1947.

Priorities Regulation 33, 11 F.R. 601, 4085, (1946) was promulgated by the Civilian Production Administration, whose functions were transferred to the F.H.A., which adopted Priorities Regulation 33. The Regulation provided priorities assistance to carry out the Veterans Emergency Housing Program, calling for the construction of moderate and low cost housing accommodations to meet the needs of returning veterans.

Priorities Regulation 33, Sec. 944.54(e) provided:

> '*Construction of the project.* A builder who constructs, converts, alters or repairs housing accommodations under this regulation must do the work in accordance with the description given in the application, except where he has obtained written approval for a change from the agency which approved the original application.'

Priorities Regulation 33, Sec. 944.54(g)(ii) provided:

> 'A builder must not sell a one-family dwelling unit built or converted under this regulation, *including the land and all improvements (including garage if provided)*, for more than the maximum sales price specified in the application, as approved, including within this sales price the amount of any brokerage fees or commissions paid in connection with the sale, whether paid by the builder or by the purchaser.' (Underscoring Supplied)

It is alleged in plaintiff's first cause of action that the sale of 25 of the units have construction deficiencies which fail to meet the plans and specifications contained in appellants' application approved by the F.H.A. The second cause of action alleges that the sale of 9 units was in excess of the maximum sales price of $8,000, and also alleges that a special improvement district for the construction of water mains, sewers, curbs, gutters, and pavement by Yellowstone County was created upon the petition of appellants. The cost of these improvements were subsequently assessed against the adjacent dwellings, and became tax liens against the 25 units sold by the appellants. The Government alleges that the maximum sales price of $8,000, as represented by appellants and as required by Priorities Regulation 33, Sec. 944.54(g)(ii), included all special improvements, such as sewers, water mains, curbs, gutters and street paving. Hence, it is alleged, the purchasers were forced to pay in excess of the authorized ceiling prices for the units, thereby unjustly enriching appellants.

The complaint prayed for (1) a mandatory injunction directing the appellants to complete the construction of

the units in accordance with the plans and specifications, or in the alternative, an award to each purchaser in the amount of the value of the nonconformity of the units; (2) a mandatory injunction directing the appellants to restore to the named purchasers the amounts of direct overcharges received by the appellants in the sale of the units at over-ceiling prices; and (3) a mandatory injunction directing appellants to make restitution to the named purchasers by paying the special improvement levy of Yellowstone County, Montana, against each of the 25 dwellings, or be required to reimburse the named purchasers in the amounts of the tax liens.

Appellants admit having caused Yellowstone County to create a special improvement district for the construction of water mains, sewers, curbs, gutters, and pavement, which resulted in the tax lien against the dwellings sold by appellants. They deny, however, that the maximum sales price of $8,000 included all or any of the special improvements provided by the special improvement district. Appellants also deny that any deficiencies as to plans and specifications in the construction of the units exist, and affirmatively allege that the units were constructed in substantial compliance with the plans and specifications, and were accepted after inspection by an agent of the F.H.A. as being in full conformity therewith.

Appellants deny any direct overcharges. Heretofore, the trial court, taking the view that the appellants, in substance, admitted in their answer that the units were sold in excess of the maximum price, entered a summary judgment granting the relief prayed for relative to the special improvement levy in the second cause of action of the complaint. On appeal this court, finding that a

substantial question of fact was presented for determination, remanded the cause for further proceedings. See Hartwig et al v. U. S. A., 9 Cir., 1954, 209 F.2d 604.

Upon remand, the trial court referred the case to a special master for a hearing and a finding as to whether any of the units were sold at prices in excess of the maximum price agreed upon, and the value of any construction defects existing.

The special master found that representatives of the F.H.A. accepted the units in question as being in substantial compliance with the plans, but that said representatives acted in excess of their authority; that notwithstanding such acceptance, the construction defects and omissions claimed did exist, and that the purchasers should be compensated therefor.

The master also found that the maximum authorized sales price of $8,000 was intended by the parties to include the special improvements for which the special improvement district was formed and upon which improvement taxes were levied, and that the purchasers suffered indirect overcharges, for which they should be compensated by appellants.

The District Court, after reviewing the evidence, adopted the findings of the special master in full. The master having omitted to make findings on the alleged direct overcharges, the District Court supplied this omission and found that nine of the units were sold at a price in excess of $8,000 by virtue of extra charges for electric fixtures which should have been included in the $8,000 price. The District Court further found that the interest upon the tax liens levied and assessed by the special improvement district upon the purchasers of the units should be reimbursed by appellants. It entered judgment against

appellants for the value of the construction defects and omissions as listed by the master, the sums set forth as direct overcharges for electric fixtures, and the sums representing the special improvement district levies, all together with interest and costs.

At the outset of our consideration of this appeal, we are met with the contention by appellants that the repeal of the Veterans Emergency Housing Act of 1946 by the Housing and Rent Act of 1947, 61 Stat. 193 (1947), deprived the Government of its right of action, both at law and in equity.

The Veterans Emergency Housing Act of 1946, 60 Stat. 207, enacted on May 22, 1946, created a housing expediter to insure an adequate supply of low cost housing accommodations for returning veterans by attempting to overcome shortages in building materials and accelerate home construction with preference to veterans. Priorities Regulation 33 had been issued by the Civilian Production Administration prior to the enactment of the Veterans Emergency Housing Act of 1946; the Housing Expediter under the 1946 Act continued the regulation in force until December 31, 1947.

On June 30, 1947, Congress repealed all of the 1946 Act, except for certain minor provisions not material here. The repealing statute, the Housing and Rent Act of 1947, 61 Stat. 193 (1947), provided in Sec. 1(a):

> 'Sections 1, 2(b) through 9, and sections 11 and 12, of Public Law 388, Seventy-ninth Congress, are hereby repealed, and any funds made available under said sections of said Act not expended or committed prior to the enactment of this Act are hereby returned to the Treasury: Provided, That any allocations made or committed, or priorities granted for the delivery, of

any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect.'

It is urged that Priorities Regulation 33 became ineffective with the repeal of the 1946 Act, and that all rights of action under the 1946 Act ceased upon its repeal, save the allocations and priorities expressly excepted by the repealing proviso. Consequently, it is argued, this action brought by the Government on October 8, 1948, after the repeal, did not state a cause of action.

Appellants' position is that the limited savings clause in the repealing statute, together with the change in policy from having maximum price protection for veterans housing as in the 1946 Act to no price restrictions as in the 1947 Act, necessarily imply that the rights and remedies accruing under the 1946 Act were abated by repeal in 1947, except for the allocations and priorities mentioned in the savings clause.

They conceded, however, in their answers that the dwelling units in question were sold before the repeal of the 1946 Act on June 30, 1947, so that the only question presented is whether the right of actions arising upon the sale of the units abated upon the repeal of the Act.

United States v. Fortier et al, 1951, 342 U.S. 160, 72 S. Ct. 189, 96 L. Ed. 179, cited by appellants in support of their position, held that houses sold after the repeal of the Veterans Emergency Housing Act of 1946 were not subject to maximum price stipulations made under Priorities Regulation 33. The question presented on this ap-

peal as to houses sold while the statute was in effect was not passed upon.

The general savings statute found that 1 U.S.C.A. Sec. 109, authorizing the enforcement of causes of action arising prior to the repeal of statutes subsequent to such repeal, preserved the Government's right of action under the 1946 Act and Priorities Regulation 33. The presence of the limited savings clause in the repealing provision, nor the change in Congressional price protection policy, do not exclude either expressly or by implication the effect of the general savings statute. United States v. Carter, 5 Cir., 1948, 171 F.2d 530; Pruitt v. Litman, 89 F. Supp. 705 (E.D. Pa., 1949); United States v. Tyler Corporation, 90 F. Supp. 395 (E.D. Va., 1949); Rheinberger v. Reiling, 89 F. Supp. 598 (D. Minn., 1950); United States v. Fortier et al, 1951, Footnote 3, 342 U.S. 160, 72 S. Ct. 189, 96 L. Ed. 179; contra, Sevidy v. Superior Homes Builders, 7 Cir., 1951, 188 F.2d 729 (dictum).

Appellants contend that Sec. 944.54(g)(ii) of Priorities Regulation 33 read in pari materia with the rest of the Regulation and viewed with the policy of the 1946 Act, indicates that the term 'improvements' has reference to accommodations constructed by the builder with the use of priority materials. Hence, they urge there can be no liability upon appellants for the special assessment improvements in which materials obtained without priority ratings were used.

Appellants represented to the Government that street and utility improvements would be installed by them and included in the sales price, and that purchasers of the units would not be required to pay any special assessments. The Housing Expediter was empowered in Sec. 2 of the Veterans Emergency Housing Act of 1946 to

issue regulations necessary to the exercise of his powers, and priorities Regulation 33 was within the purview of the statute. Sec. 944.54(e) of Priorities Regulation 33 provided that the builder must do the work in accordance with the description given in his application. Appellants were bound by their representation that street and utility improvements would be included in the sales price, and no special assessments would be levied upon the purchasers. The special master found that the maximum authorized sales price of $8,000 was intended by the parties to include the special improvements for which the special taxes were levied. The District Court adopted this finding, and there being sufficient evidence to support the finding, we are required to follow it.

The units were conveyed by warranty deeds to the purchasers prior to the attachment of the special improvement liens, and the levy fell solely upon the purchasers. Consequently, appellants urge no liability can be enforced against themselves for the assessments. We do not agree. The maximum sales price was to include all of the items included in the special assessment levy, and the purchasers who were required to pay in excess of the maximum sales price because of appellants' failure to perform their contract should be reimbursed for the sum paid to satisfy the liens.

Appellants rely upon a favorable Compliance Inspection Report made by an F.H.A. Building Inspector on October 29, 1947, who certified that 'Building improvements acceptably completed.' The purpose of the inspection, as indicated by the F.H.A. form, as well as the date of inspection being after the repeal of the 1946 Act, was to enable the builder to obtain F.H.A. insurance.

Although the Compliance Inspection Report indicated acquiescence in the deviations, the United States was not bound by the unauthorized approval of its agent, who was bound to follow Sec. 944.54(e) of Priorities Regulation 33, requiring written approval upon application of the builder for changes in plans from those specified in the original application. See United States v. Austin, 100 F. Supp. 33, 42 (D.Md., 1951).

Affirmed.

(Endorsed:) Opinion. Filed May 23, 1957.

Paul P. O'Brien, Clerk.

No. 15145

2. JUDGMENT

United States Court of Appeals for the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Montana, Billings Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana, Billings Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: May 23, 1957

PAUL P. O'BRIEN, Clerk